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*Gloria Flores*

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

GLORIA FLORES, : Civil Action No.: \_\_\_\_\_  
Plaintiff, :  
v. :  
DISCOVER BANK, NA, : **COMPLAINT**  
Defendant. :  
:

## **JURISDICTION**

1. This action arises out of Defendant's violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (the "TCPA") by negligently, knowingly, and/or willfully placing automated calls to Plaintiff's cellular phone without consent, thereby violating the TCPA.

1       2. This action is also brought under Nevada Revised Statutes Chapter 598.0918  
2 (“NRS 598”) and Nevada Revised Statutes Chapter 41.600 *et seq.* (“NRS 41.600”) for  
3 Defendant’s deceptive trade practices as further described herein.

4       3. Plaintiff alleges as follows upon personal knowledge as to Plaintiff and Plaintiff’s  
5 own acts and experiences, and, as to all other matters, upon information and belief, including  
6 investigation conducted by Plaintiff’s attorneys.

7       4. Supplemental jurisdiction exists pursuant to 28 U.S.C. § 1337 and this Court has  
8 original jurisdiction over Plaintiff’s TCPA claims. *Mims v. Arrow Fin. Serv., LLC*, 132 S.Ct. 740  
9 (2012).

10       5. Venue is proper in this District pursuant to 28 U.S.C. §§ 1331(b) & (c), because  
11 Plaintiff resides within the District of Nevada, a substantial portion of the events or omissions  
12 giving rise to the claim occurred in this District, and Defendant regularly conducts business in  
13 this District.

#### PARTIES

14       6. Plaintiff Gloria Flores (“Plaintiff”) is an adult individual residing in Las Vegas,  
15 Nevada.

16       7. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47  
17 U.S.C. § 153(39).

18       8. Defendant Discover Bank, NA (“Discover”) is doing business in the State of  
19 Nevada.

20       9. Discover is, and at all times mentioned herein was, a corporation and a “person,”  
21 as defined by 47 U.S.C. § 153 (39).

22       23       24       25       26       27       28       / / /

**THE TELEPHONE CONSUMER PROTECTION ACT OF 1991**

10. In 1991, Congress enacted the TCPA in response to a growing number of  
 2 consumer complaints regarding certain telemarketing practices.

11. The TCPA regulates, among other things, the use of automated telephone dialing  
 5 systems.

12. 47 U.S.C. § 227(a)(1) defines an automatic telephone dialing system (“ATDS”) as  
 7 equipment having the capacity –

9 (A) to store or produce telephone numbers to be called, using a  
 10 random or sequential number generator; and  
 11 (B) to dial such numbers.

12. In *Marks v. Crunch San Diego LLC*, the Ninth Circuit noted that the statutory  
 13 definition of an ATDS includes: “equipment which has the capacity—(1) to store numbers to be  
 14 called or (2) to produce numbers to be called, using a random or sequential number generator—  
 15 and to dial such numbers automatically (even if the system must be turned on or triggered by a  
 16 person)[.]”<sup>1</sup> The panel clarified that “[c]ommon sense indicates that human intervention of some  
 17 sort is required before an autodialer can begin making calls, whether turning on the machine or  
 18 initiating its functions.” *Id.*

20. Consumers have a right to revoke consent from receiving autodialed calls or  
 21 prerecorded messages by using any reasonable method including orally or in writing. *Gager v.*  
 22 *Dell Fin. Servs., LLC*, 12-2823, 727 F.3d 265, 2013 U.S. App. LEXIS 17579, 2013 WL 4463305  
 23 (3d Cir. Aug. 22, 2013).

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27 <sup>1</sup> --- F.3d ----, 2018 WL 4495553, at \*9 (9th Cir. Sept. 20, 2018). Consequently, the Court  
 28 rejected appellee’s “argument that a device cannot qualify as an ATDS unless it is fully automatic,  
 meaning that it must operate without any human intervention whatsoever.” *Id.* at \*9.

**ALLEGATIONS APPLICABLE TO ALL COUNTS**

1       15. Within the four years prior to filing the instant complaint, Plaintiff received  
2 numerous calls from Discover.

4       16. Upon information and belief, Defendant employs an automatic telephone dialing  
5 system (“ATDS”) which meets the definition set forth in 47 U.S.C. § 227(a)(1).

6       17. Defendant or its agent/s contacted Plaintiff on Plaintiff’s cellular telephone number  
7 via an ATDS as defined by 47 U.S.C. § 227(a)(1), as prohibited by 47 U.S.C. § 227(b)(1)(A).

9       18. In the calls Plaintiff did answer, there would be a short pause lasting about two to  
10 three seconds between the time the calls were answered and the time a live agent was introduced as  
11 a representative from Defendant.

12       19. Upon information and belief, based on the pause and lack of prompt human response  
13 during the phone calls in which Plaintiff answered, Defendant used a predictive dialing system to  
14 place calls to Plaintiff.

16       20. “A predictive dialer is equipment that dials numbers and, when certain computer  
17 software is attached, also assists [caller] in predicting when an [agent] will be available to take calls.  
18 The hardware, when paired with certain software, has the capacity to store or produce numbers and  
19 dial those numbers at random, in sequential order, or from a database of numbers.” *Meyer v.*  
20 *Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012).

22       21. Furthermore, a system does not need to actually store, produce, or call randomly or  
23 sequentially generated telephone numbers to be considered an Automatic Telephone Dialing  
24 System, it only need have the capacity to do so. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946,  
25 948 (9th Cir. 2009).

1       22. Upon information and belief, the predictive dialing system employed by Defendant  
2 transfers the call to a live agent once a human voice is detected, thus resulting in a pause after the  
3 called party speaks into the phone.

4       23. In or about the late summer months of 2020, Plaintiff specifically instructed  
5 Defendant or its agent(s) not to call her cell phone ever again thereby revoking consent, if any ever  
6 existed, to be contacted by Defendant via an ATDS.

7       24. Moreover, Defendant did not have prior express consent to place any automated or  
8 prerecorded calls to Plaintiff on Plaintiff's cellular telephone at any time.

9       25. However, Defendant continued placing calls to Plaintiff's cellular telephone without  
10 consent using an ATDS in violation of the TCPA.

11       26. Defendant's ATDS has the capacity to store or produce telephone numbers to be  
12 called, using a random or sequential number generator.

13       27. The telephone number Defendant used to contact Plaintiff was and is assigned to a  
14 cellular telephone service as specified in 47 U.S.C. § 227(b)(1)(A)(iii).

15       28. Defendant's calls to Plaintiff's cellular telephone were not for "emergency  
16 purposes."

17       29. Pursuant to the TCPA, the burden is on Defendant to demonstrate it had prior  
18 express consent to call Plaintiff's cellular phone with an ATDS.

19       30. While very minor, Plaintiff suffered actual harm and loss, since each of the  
20 unwanted calls depleted Plaintiff's cell phone's battery, and the cost of electricity to recharge the  
21 phone is a tangible harm. Though small, this cost is a real one, and the cumulative effect can be  
22 consequential, just as is true for exposure to X-rays resulting from Defendant's unwanted phone  
23 calls to Plaintiff's cell phone.

31. However, Plaintiff also suffered from an invasion of a legally protected interest by placing calls to Plaintiff's personal phone line when Defendant had no right to do so, resulting in an invasion of Plaintiff's right to privacy. The TCPA protects consumers from this precise behavior.

32. Plaintiff has a common law right to privacy. *E.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 1155, 193 (1890). Congress sought to further protect that right by enacting the TCPA.

33. “[W]hen a person must endure the bother of unwanted calls in the privacy of her home, her harm is similar to other traditional injuries that courts have long recognized, such as invasion of privacy and nuisance.” *Toldi v. Hyundai Capital Am.*, No. 2:16-CV—01877-APG-GWF, 2017 WL 736882, at \*2 (D. Nev. Feb. 23, 2017).

34. Plaintiff was also personally affected, since Plaintiff felt her privacy had been invaded when Defendant placed automated calls to Plaintiff's phone line without any consent to do so.

35. The injury suffered by Plaintiff is concrete because Defendant's violations caused Plaintiff to suffer an invasion of privacy.

## COUNT I

**Negligent Violations of the  
Telephone Consumer Protection Act,  
(47 U.S.C. § 227, *et seq.*)**

36. Plaintiff repeats and realleges the above paragraphs of this Complaint and incorporates them herein by reference.

37. Defendant negligently placed multiple automated calls to cellular numbers belonging to Plaintiff without Plaintiff's prior express consent.

38. Each of the aforementioned calls by Defendant constitutes a negligent violation of

1 the TCPA.  
2

3 39. As a result of Defendant's negligent violations of the TCPA, Plaintiff is entitled  
4 to an award of \$500.00 in statutory damages for each call in violation of the TCPA pursuant to  
5 47 U.S.C. § 227(b)(3)(B).  
6

7 40. Additionally, Plaintiff is entitled to and seek injunctive relief prohibiting such  
8 conduct by Defendant in the future.  
9

10 **COUNT II**  
11

12 **Knowing and/or Willful Violations of the  
13 Telephone Consumer Protection Act,  
14 (47 U.S.C. § 227, *et seq.*)**  
15

16 41. Plaintiff repeats and realleges the above paragraphs of this Complaint and  
17 incorporates them herein by reference.  
18

19 42. Defendant knowingly and/or willfully placed multiple automated calls to cellular  
20 numbers belonging to Plaintiff without Plaintiff's prior express consent.  
21

22 43. Each of the aforementioned calls by Defendant constitutes a knowing and/or  
23 willful violation of the TCPA.  
24

25 44. As a result of Defendant's knowing and/or willful violations of the TCPA,  
26 Plaintiff is entitled to an award of treble damages up to \$1,500.00 for each call in violation of the  
27 TCPA pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).  
28

29 45. Additionally, Plaintiff is entitled to seek injunctive relief prohibiting such conduct  
30 by Defendant in the future.  
31

32     ///  
33

### COUNT III

#### **Defendant's Violations of Nevada's Deceptive Trade Practices Act (NRS 598.0918)**

46. Plaintiff repeats and realleges the above paragraphs of this Complaint and  
5 incorporates them herein by reference.

47. "Solicitation" means "the act of... seeking to obtain" something – in this case  
7 money. *Solicitation*, Black's Law Dictionary (2d Pocket Ed. 2001).

48. Here, Defendant solicited Plaintiff to seek or obtain money from Plaintiff.

49. On March 13, 2001, Assembly Bill 337 (AB 337) was introduced to the Nevada  
11 State Legislature. AB 337 revised Nevada's Deceptive Trade Practices statutes codified at NRS  
12 598 et seq.

50. As expressed by Marilyn Skibinski, Regulatory Analyst, Bureau of Consumer  
14 Protection, AB 337 was enacted to "provide[] additional protection for consumers." *See Minutes*  
15 of the Meeting of the Assembly Committee on Commerce and Labor, 71<sup>st</sup> Session, April 4, 2001,  
17 page 1082, which can be viewed at  
18 <http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/2001/AB337,2001.pdf>  
19 ("AB 337 Minutes").

51. Further, AB 337 was specifically intended to apply to companies (like Defendant)  
21 using "automatic calling" or automated dialing systems. As Ms. Rushton stated in response to  
22 Senator Maggie Carlton, "[that] is exactly what [AB 337 is intended to do]." *Id.* at page 4093.

52. In specific, AB 337 made it a deceptive trade practice to, during a solicitation by  
25 telephone, to:

- 27 a. Repeatedly or continuously conduct the solicitation or presentation in a manner  
28 that is considered by a reasonable person to be annoying, abusive or harassing;

- b. Solicit a person by telephone at his or her residence between 8 p.m. and 9 a.m.
- c. Block or otherwise intentionally circumvent any service used to identify the caller when placing an unsolicited telephone call; or
- d. Place an unsolicited telephone call that does not allow a service to identify the caller by the telephone number or name of the business, unless such identification is not technically feasible.

53. Defendant repeatedly and continuously placed telephone calls to Plaintiff's residential phone (which is also Plaintiff's cellular phone) to solicit money from Plaintiff in a manner that would be considered annoying, abusive, or harassing by a reasonable person.

54. Specifically, Defendant placed calls to Plaintiff's cell phone even after Plaintiff demanded Defendant cease calls to Plaintiff. Such conduct is unquestionably harassing and annoying.

55. As a direct consequence of Defendant's harassing phone calls, acts, practices, and conduct, Plaintiff suffered and continues to suffer from anxiety, emotional distress, frustration, and has otherwise been totally annoyed by Defendant's intrusive and illegal phone calls. Plaintiff has also lost the use of personal and family time while enduring these frustrations, as well as lost time and minutes from cell phone use, for which Plaintiff is charged a fee.

56. Defendant's violations of NRS 598.0918 constitute violations of NRS 41.600 and Plaintiff is entitled to relief under NRS 41.600

## COUNT IV

## Invasion of Privacy Intrusion into Seclusion

57. Plaintiff incorporates by reference all of the paragraphs of this Complaint as though fully stated herein.

58. Nevada recognizes the common law tort for an invasion of privacy of intrusion into seclusion finding "[r]epeated and continuous calls in an attempt to collect a debt give rise to

1 a claim for intrusion upon seclusion." *Peatrowsky v. Persolve*, No. 2:12-cv-00935-JAD-VCF,  
2 2014 U.S. Dist. LEXIS 38320, at \*26-27 (D. Nev. Mar. 24, 2014).

3 59. Further, Congress explicitly recognized a consumer's inherent right to privacy in  
4 collection matters in passing the Fair Debt Collection Practices Act, when it stated as part of its  
5 findings:

6 **Abusive debt collection practices contribute** to the number of personal  
7 bankruptcies, to marital instability, to the loss of jobs, and **to invasions of**  
**individual privacy.**

8 9 15 U.S.C. § 1692(a) (emphasis added).

10 10 60. Defendant and/or its agents intentionally and/or negligently interfered, physically  
11 or otherwise, with the solitude, seclusion and or private concerns or affairs of this Plaintiff,  
12 namely, by repeatedly and unlawfully inundating Plaintiff with phone calls as discussed above  
13 and thereby invaded Plaintiff's privacy as expressed in the foregoing. To recap however, these  
14 invasions included a persistent disregard of Plaintiff's demands Defendant cease these intrusive  
15 communications. Indeed, Plaintiff's attempts to curb Defendant's collection communications  
16 fell on deaf ears.

17 17 61. As a result, Defendant flagrantly disrespected Plaintiff's right to live peaceably  
18 and in solitude. Defendant simply knew better, but as a business policy disregards rights of  
19 consumers like Plaintiff regardless of the personal costs to Plaintiff's common law right to  
20 solitude and peace.

21 21 62. Plaintiff had a reasonable expectation of privacy in Plaintiff's solitude, seclusion,  
22 private concerns and/or affairs.

23 23 63. Defendant's conduct in engaging in the above-described illegal collection conduct  
24 against this Plaintiff resulted in multiple intrusions and invasions of privacy which occurred in a  
25

way that would be highly offensive to a reasonable person in that position.

64. As a result of such intrusions and invasions of privacy, Plaintiff is entitled to actual damages in an amount to be determined at trial from Defendant, as well as punitive damages.

## **ER FOR RELIEF**

**WHEREFORE**, Plaintiff prays that judgment be entered against Defendant awarding Plaintiff:

**Plaintiff:**

1. Injunctive relief prohibiting such violations of the TCPA by Defendant in the future;
2. Statutory damages of \$500.00 for each and every call in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B);
3. Treble damages of up to \$1,500.00 for each and every call in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(C);
4. Actual damages including, but not limited to, the emotional distress Plaintiff has suffered (and continues to suffer) as a result of the intentional, reckless, and/or negligent violations of NRS 598.0918 as permitted under NRS 41.600;
5. Actual damages and punitive damages for Defendant's privacy violations;
6. An award of attorney's fees and costs to counsel for Plaintiff; and
7. Such other relief as the Court deems just and proper.

111

## **TRIAL BY JURY DEMANDED ON ALL COUNTS**

Dated: March 25, 2021

Respectfully submitted,  
By /s/ David Krieger, Esq.

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